

(Guard file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD KARACHI

DB-1

APPEAL NO. AT-49/2019

M/s Global Environmental Lab
(Pvt) Limited, Karachi.....Appellant

Versus

Assistant Commissioner, SRB,
Karachi.....Respondent

APPEAL NO. AT-50/2019

M/s Global Environmental Management Services
(Pvt) Limited, Karachi.....Appellant

Versus

Assistant Commissioner, SRB,
Karachi.....Respondent

Date of Filing of Appeal: 06 05.2019

Date of Hearing: 10 05.2019

Date of Order: 13 05.2019



Dr. Sami uz Zaman, Director and Chairman along with Mr. Muhammad Talha,
Accountant for the appellant.

Ms. Sonia Sheikh, AC-SRB for respondent.

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ORDER

Justice (R) Nadeem Azhar Siddiqi. These appeals have been filed by the appellant challenging the Order of the Commissioner (Appeals) in Appeal No. No.88/2018 and Appeal No. 92/2018 refusing to extend the stay beyond sixty days as provided under section 53 (4) of the Sindh Sales Tax on Services Act, 2011.

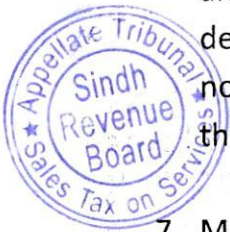
1. We intend to decide both the abovementioned appeals by the common order as the facts and points of law involved in both the appeals are one and the same.
2. The facts of the case are the Assessing Officer passed order-in-original No. 224/2018 dated 09.04.2018 and 269/2018 which was challenged before Commissioner (Appeals) by way of filing Appeal No.88/2018 and 92/2018 along with an application for stay. The stay was granted which remained effective for sixty days and after expiry of statutory period the Commissioner (Appeals) refused to extend the stay vide order dated 03.05.2019.
3. It is stated by Mr. Sami uz Zaman the learned representative of the appellant that both appeals are pending before the Commissioner (Appeals-I) since April, 2018 and May, 2018 and the appellant was not instrumental in delaying the appeal. It is further stated that during pendency of appeal before Commissioner (Appeals) tax amounting to Rs.2,510,530/- was deposited against the determined tax amount of Rs.2,490,976/- (In Appeal No. 49/2019) and Rs. 1,492,009/= was deposited (in Appeal No. 50/2019) and now the dispute is only in respect of penalties and default surcharge, which the appellant is not liable to pay. It is also stated that forced recovery without determination by an independent forum is against the principle of natural justice and due process of law. It was also stated that the appeal before Commissioner (Appeals) is fixed on 15.05.2019 for reconciliation.
4. Mr. Sami for the appellant further stated that despite the Commissioner (Appeals) advice dated 03.05.2019 not to recover tax during pendency of appeal the department has attached the bank account on same day i.e.



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03.05.2019 and recovered an amount of Rs.731,959/- from the bank account (appeal No. 49/2019) and Rs.142,000/= and Rs.230,000/= (in Appeal No.50/2019). It is also stated that in case the attachment order is not withdrawn and stay is not granted the appellant will not be able to do its day to day business and suffer irreparable monetary losses.

5. Mr. Sami for the appellant submitted that they have paid full principal tax amounting to Rs.2,490,976/- in Appeal No. AT-49/2019 and Rs.1,492,009/= in Appeal No. AT-50/2019 and also partly paid default surcharge. He submitted that under the proviso to Section 66 (1) the officer concerned should not issue any notice of recovery as the appellant has deposited more than twenty five percent of the tax amount. He submitted that excess amount of Rs. 731,959/- (Appeal No. 49/2019) and Rs.372,000/= (Appeal No. 50/2019) recovered from the Allied Bank Limited in violation of proviso to section 66 (1) may be refunded as it was illegally recovered. He then submitted that the action of the department in taking coercive measures despite payment of full amount of tax is malafide and is the high handness of the department/AC and the same should be stopped and the appellant be compensated against such illegal extortion of money.
6. Ms. Sonia Shaikh the learned AC submitted that Commissioner (Appeals) has granted stay and the same cannot be extended beyond sixty days as provided under sub-section (4) of Section 58 of the Act, 2011. She submitted that bank account was rightly attached as there was no stay and submitted that after receiving the order of this Tribunal she has detached the bank accounts of the company and assured that she will not take any further action till disposal of the appeal of the appellant by the Commissioner (Appeals) or as directed by this Tribunal.
7. Ms. Sonia, AC further submitted that her recovery proceedings were about default surcharge which was payable as on 17.01.2019 as also agreed by them to pay and that the bank attachment was not in violation of proviso of sub-section (1) of section 66 of the Act.



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8. Mr. Talha Accountant submitted that default surcharge was worked out on the instruction of Commissioner (Appeals) and partly has been paid under amnesty and is not required to pay any further default surcharge.

We have heard the learned representative of the parties and perused the record made available before us.

9. This case appears to be a case of hardship. The appeal is still pending before Commissioner (Appeals) and during the pendency of appeal tax more amount than determined by the Assessing Officer has been paid even then the bank account was attached in utter violation of provision to sub-section (1) of section 66 of the Act of 2011. Apparently the appellant is not at fault if the appeal was not decided by Commissioner (Appeals) within a reasonable time and the appellant is entitled to protect its right. We also failed to understand that when the principal amount of tax has been deposited and the default surcharge was also deposited under amnesty scheme, why appeal has been kept pending and for what purpose the reconciliation is required.

10. From the record it appears that the AC has determined the tax of Rs.2,490,976/=, (In Appeal No. 49/2019) whereas the appellant has deposited a sum of Rs.2,510,530/- and in Appeal No. 50/2019 Rs.1,492,009/= was deposited against the determined amount of Rs.1,473,785/= beside some amount towards default surcharge.

11. Section 66 of Chapter X of the Act of 2011 deals with Recovery of Arrears. Provision to sub-section (1) of section 66 read as under:-

"[Provided that the officer of the SRB shall not issue notice under this section or the rules made thereunder for recovery of any tax due from a taxpayer if the said taxpayer has filed an appeal under section 57 in respect of the order under which the tax sought to be recovered has become payable and the appeal has not been decided by the Commissioner (Appeals), subject to the condition that an amount equal to twenty-five per cent of the amount of tax due has been paid by the tax payer".]



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12. The proviso provides two conditions i.e. 1. Appeals filed under section 57 of the Act were filed and were pending before Commissioner (Appeals) and 2. an amount equal to twenty five percent of the amount of tax due has been paid by the tax payer. The appellant fulfill both the conditions as the appeal was pending on the date of action and instead of twenty five percent of tax amount more amount of tax as determined by AC was deposited and the issuance of attachment order and recovering an amount of Rs.731,959/= in appeal No. 49/2019 and Rs.372,000/= in appeal No. 50/2019 is malafide and illegal and cannot be sustained in law and the appellant has rightly described the same as high handedness of the Officer of SRB. In Appeal No. AT-49/2019 the tax including default surcharge and penalties (we are not commenting on the legality and merits of imposing penalties and default surcharge as the appeals are still pending before the Commissioner (Appeals) and he has to decide the same) comes to Rs.7,322,479/= the 25% of which comes to Rs.1,830,619/=. In Appeal No. AT-50/2019 the tax including default surcharge and penalties (we are not commenting on the legality and merits of imposing penalties and default surcharge as the appeals are still pending before the Commissioner (Appeals) and he has to decided the same) comes to Rs.5,729,054/ the 25% of which comes to Rs.1,374,972/=. From this it is clear that more amounts have been deposited in both the appeals and the action of the AC in attaching the bank accounts is malafide and is not sustainable in law.

13. Firstly, from the attachment of bank accounts it appears that the same were taken without notice and without providing any right of hearing to the appellant or its representative in violation of principle of natural justice and "*audi alteram partem* (no one can be condemned unheard). This principle applies to judicial, quasi-judicial and administrative bodies (PLD 1997 Karachi 1). The right of hearing has to be read in every statute even if the said statute does not provide for right of hearing (PLD 1981 Karachi 311). Furthermore Article 4 of the Constitution of Pakistan provides that right of individual to be dealt with in accordance with law. To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. After insertion of Article 10A in



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the Constitution a person shall be entitled to a fair trial and due process of law. (emphasis supplied) Due process of law includes the right to be treated according to law and right of hearing is the part of due process of law.

14. The issuance of notice before any coercive action is part of due process of law and the appellant cannot be deprived of its property in violation of its fundamental rights. The Officers of SRB are bound under law to issue notice to the tax payers before taking any coercive action.
15. The Commissioner (Appeals) should decide appeals within a reasonable time in which the stay was granted by him to avoid such situation of leaving the tax payers at the mercy of the department. Coercive action against the tax payer during pendency of appeal is against all norms, principle of natural justice and due process of law. The Department should avoid such coercive action in the interest of justice and fair play even if the stay is vacated. Since the appellant was not at fault it should not be deprived of its usual right to approach an independent forum for redressal of its grievances.
16. Based on the judgments of the superior courts we found force in the arguments of the appellant that the coercive action for recovery should not be initiated by the department till the matter is heard by an independent forum (Appellate Tribunal). It was held by the Lahore High Court in ZN Exports Private Limited Versus Collector Sales Tax that "2. *Learned Counsel for the petitioner contends and I will agree that before a recovery created by an impugned order by a departmental authority can be effected, an assessee, appellant must be heard by a forum outside the departmental hierarchy. The Tribunal as a forum of first appeal having not disposed of the appeal, the Petitioner cannot be blamed on that account. In all fairness, equity and justice, an assessee should not be forced to pay a demand created by a Revenue Authority unless the order creating such demand has undergone the scrutiny of at least one independent forum*". In the reported judgment in nth encase of M/s S.S. Tanneries Versus Assistant Collector (Audit And Enforcement Division-II) Sales Tax and Federal Excise Tax the Lahore High Court has observed that the Honb. Supreme Court in the



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case of Mehram Ali V Federation of Pakistan PLD 1998 SC 1445 has held that essential feature of fundamental right is the determination of any grievance or dispute by an independent Tribunal.

17. In the reported judgment in the case of M/s Huawei Technologies Pakistan (Pvt) Ltd versus Commissioner Inland Revenue 2016 PTD 1799 the Lahore High Court has held that "6. In view of the aforementioned principle that has been consistently followed by this court in a number of decisions, no coercive measures are to be adopted for recovery of the disputed tax liability till the decision by an independent forum. Since the appeal, filed by the petitioner, is pending before respondent No.4, therefore, in light of the above principle, coercive measures for the recovery are not to be effected till its decision". It was further held in the same judgment that that "11. For the foregoing reasons, the instant petition is allowed and order dated 28.12.2015, attaching the accounts of the petitioner effective recovery is declared to be without lawful authority and no of legal effect. Consequently, the obtaining of pay orders by respondent No.2, from the banks of the petitioner, is also declared to be without lawful authority; therefore, amounts are to be credited back in the petitioners' accounts. Since the appeal filed by petitioner is pending before respondent No.4, therefore, the referred respondent is directed to decide the same within a period of sixty days from the receipt of this Order and meanwhile no coercive measure shall be adopted by the respondent department for the disputed tax liability". This judgment relates to Section 137 (2) of the Income Tax Ordinance, 2001 which provides for issuance of notice for payment of tax within thirty days and the action was taken without notice.

18. During hearing the learned representative of the appellant apprehends further coercive action on the part of the department and requested for grant of stay after the disposal of appeal by Commissioner (Appeals) if the appeal is decided against the appellant and to grant stay of seven days after disposal of this appeal. The apprehension of the appellant has force keeping in view the attitude of the department towards its taxpayers.



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19. Keeping in view that the appeals of appellant are still pending before the Commissioner (Appeals) and are fixed for hearing on 15.05.2019 it appears appropriate to provide protection to the appellant against coercive recovery and a fair chance to the appellant to get its appeals decided on merits.

20. In view of above, both these appeals are allowed. Since in both the appeals the amount has been recovered against the proviso of sub-section (1) of section 66 of the Act of 2011 the same should be refunded to the appellant within seven days from the date of receipt of copy of this order. The Commissioner (Appeals) will expeditiously proceed with the appeals pending before him and will decide the same within thirty days from the date of receipt of the copy of this order. The stay against recovery of tax dues is granted for a period of thirty days from the date of receipt of the copy of this order by Commissioner (Appeals). In case the appeals are decided against the appellant further seven days stay is granted to the appellant to avail remedy available to it under law.

21. We have noted with great dismay the attitude and behavior of the learned Assistant Commissioner towards learned Commissioner (Appeals), who is a senior officer and in his order dated 3.05.2019 observed that "**However in the meantime it is expected that pending appeal the respondent shall refrain from recovery**". (emphasis supplied) This has not been honored by the Assistant Commissioner even for few hours and on the same day i.e. 03.05.2019 the bank accounts were attached and amount was recovered against the proviso of sub-section(1) of section 66 of the Act of 2011.



22. The Assistant Commissioner in attaching the bank account against the expectation of Commissioner (Appeals) and against the proviso to sub-section (1) of section 66 of the Act, 2011 has committed serious misconduct and disciplinary action is required to be taken against her by the Board as per law. Since the Assistant Commissioner has unnecessarily harassed the tax payer she is also liable to compensate the appellant. We recommend that the appellant be compensated suitably

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by the SRB by deducting an amount equal to the amount which was recovered from the bank accounts of the appellant from the reward amount to be given to the Assistant Commissioner by SRB (this is in addition to the refund of amount recovered from the attachment of the bank accounts).

23. We are constrained to observe that it appears to us that the officers who are vested with quasi-judicial powers are even not aware about the basic principles of law and in passing orders and taking actions not only avoiding the orders of the Tribunal but also ignoring the judgments of the superior courts which are binding on all the officers of SRB under Article 189 and 201 of the Constitution. In our view the non-adhering of judgments of the Superior Court is amounts to contempt of court and on a reference action can be taken against the delinquent officers of SRB under Article 204 of the Constitution. We are sanguine that the Board will look into the matter and take necessary steps to avoid repetition of such acts in future and shall instruct the officers to follow the judgments of the superior courts, under intimation to this Tribunal.

24. The appeals and stay applications are disposed of in the above terms. The copy of this order be provided to the learned representatives of the parties and to the learned Chairman, SRB and to the learned Secretary of the SRB, Board for placing this order before the Board for consideration and to take necessary steps in compliance of the order in the next meeting under intimation to this Tribunal.


(Agha Kafeel Barik)
TECHNICAL MEMBER

Karachi:

Dated 13.05.2019

Copies supplied for compliance:-

1. The Chairman-SRB, Karachi,


(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Certified to be True Copy


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on.....

15/5/19
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Registrar

Order Dispatched on.....

15/5/19
Registrar

2. The Secretary to the Board to place this order before the Board
In its next meeting under intimation to this Tribunal.

Copies for the Parties:-

3. The Appellant through authorized Representative.
4. The Assistant Commissioner (Unit-), SRB, Karachi.
To, refund the amount and report compliance.
- 5) Commissioner (Appeals-I), SRB, Karachi
- 6) Office copy
- 7) Guard file.